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Before the
Federal Communication Commission
Washington, D.C. 20554

DA 96-948

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 96-137
Table of Allotments,) RM-8823
FM Broadcast Stations.)
(Negaunee, Michigan))

NOTICE OF PROPOSED RULE MAKING

Adopted: June 14, 1996

Released: June 21, 1996

Comment Date: August 12, 1996

Reply Comment Date: August 27, 1996

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Todd Stuart Noordyk ("Noordyk") proposing the allotment of Channel 270A to Negaunee, Michigan, as that community's second FM broadcast service. Noordyk requests that Channel 270A be allotted to Negaunee with cut-off protection so that he can amend his application to specify operation on Channel 270A in lieu of Channel 258A. Noordyk states his intention to apply for channel 270A if allotted to Negaunee, Michigan, with cut-off protection.

2. In support of his proposal, Noordyk states that the allotment of Channel 270A will eliminate the mutual exclusivity between the two cut-off applications for a new class A FM channel at Negaunee, Michigan. Noordyk further states that at the present time, there is no basis upon which to either designate the applications for hearing or to otherwise resolve the mutually exclusive applications. See Bechtel v. FCC, 10 F.3d 875 (D. C. Cir. 1993). Noordyk contends that by allotting Channel 270A to Negaunee, both pending applications may be granted. Further, Noordyk contends that his proposal is consistent with the Commission's policy to resolve conflicts between applicants to provide the community with additional FM transmission service and would also avoid a comparative hearing, citing Casper, Wyoming, MM Docket No. 95-138, 11 FCC Rcd 1071 (1996), Cheyenne & Saratoga, Wyoming, MM Docket 95-98, 11 FCC Rcd 1073 (1995), and Albion, Nebraska 10 FCC Rcd 3183 (1995), rev. denied, 10 FCC Rcd 11931 (1995). In the event there is an expression of interest for the use of Channel 270A at Negaunee, Noordyk indicates that Channel 250A can be allotted to the community. Noordyk urges the grant of this proposal which will leave Goetz Communications Corp. as the sole applicant for Channel 258A at Negaunee while Noordyk will modify his application for Channel 258A to specify operation on Channel 270A with cut-off protection.

Noordyk points out that Commission precedent generally favors settlements as a way of reducing the time, cost and uncertainty of protracted litigation, citing generally, RKO General, Inc., 3 FCC Rcd 5057 (1988).

3. We believe that the proposal warrants consideration since it could potentially provide the community with its second FM broadcast service. The allotment of Channel 270A would allow Noordyk to amend his application for Channel 258A at Negaunee, thereby resolving the mutual exclusivity for the channel. Channel 270A can be allotted to Negaunee, Michigan, in compliance with the Commission's spacing requirements at Noordyk's specified site.¹ Since Negaunee is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment. As it appears there is an additional equivalent class channel available for other expressions of interest at Negaunee, we shall propose to allow Noordyk to amend his application for Channel 258A to specify operation on Channel 270A, with cut-off protection.²

4. Accordingly, we will solicit comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>	
	Present	Proposed
Negaunee, Michigan	258A	258A, 270A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before August 12, 1996, and reply comments on or before August 27, 1996, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D. C. 20554.

¹ The coordinates for Channel 270A at Negaunee are 46-28-18 and 87-36-55.

² Channel 250A can be allotted to Negaunee at coordinates 46-30-18 and 87-36-24.

Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Cary S. Tepper
Booth, Freret & Imlay, P.C.
1233 20th Street, N.W., Suite 204
Washington, D. C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

MM Docket No.96-137
RM-8823

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND THE FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved

4. Comments and reply comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Sections 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D. C. 20554

5. Number of Copies. In accordance with the provisions of Section 1.420 of the

Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center, Room 239, at its headquarters, 1919 M Street, N.W., Washington, D. C.